

**Lewis v Kabore**

2021 NY Slip Op 34030(U)

September 28, 2021

Supreme Court, Bronx County

Docket Number: Index No. 24367/2019E

Judge: Ben R. Barbato

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**SUPREME COURT STATE OF NEW YORK  
COUNTY OF BRONX PART 15**

-----X  
**DEAN LEWIS,**

Plaintiff,

**DECISION**

**Index No.: 24367/2019E**

-against-

**ABDOUL A. KABORE, VENTURE LEASING LLC, and  
CHERYL L. JAMES,**

Defendants.  
-----X

The instant action sounds in personal injury sustained from a motor vehicle accident occurring on April 20, 2018, on 7<sup>th</sup> Avenue at or near the intersection of 103<sup>rd</sup> Street, in the County, City and State of New York. The Defendants, Abdoul A. Kabore and Venture Leasing LLC, moves this court for an Order pursuant to CPLR § 3212 awarding Summary Judgment in favor of the Defendants dismissing Plaintiff's Complaint, claiming that the Plaintiff, Dean Lewis, cannot meet the serious injury threshold requirement mandated by Insurance Law § 5102(d).

Defendants submit the Affirmed report of Dr. Robert L. Cristofaro, a Board Certified Orthropaedic Surgeon, who examined the Plaintiff on February 5, 2019 and reports normal range of motion of Plaintiff's cervical spine, lumbar spine, and left shoulder. Dr. Cristofaro opines that Plaintiff suffered cervical, lumbar, and left shoulder sprain and strain which at the time of the examination had resolved.

Defendants also submit the affirmed report of Dr. Jessica Berkowitz, a radiologist who reviewed the MRI of Plaintiff's cervical spine taken at Kolb Radiology on June 30, 2018 and the MRI of Plaintiff's left shoulder taken at Kolb Radiology on June 9, 2018. Dr. Berkowitz' review of the cervical MRI reveals a disc bulge at the C3/4 level, a disc bulge at the C5/6 level impinging on the spinal cord, a central disc herniation impinging on the bilateral neural foramina at the C6/7 level. Dr. Berkowitz notes no evidence of traumatic injury or relation to the April 20, 2018 accident. Dr. Berkowitz' review of Plaintiff's left shoulder MRI reveals developmental processes related to chronic repetitive microtrauma with no evidence of acute traumatic injury.

Plaintiff submits the Affirmation of Dr. Thomas M. Kolb, a radiologist who prepared the MRI reports of Plaintiff's cervical spine, lumbar spine and left shoulder. Dr. Kolb finds a herniated disc at the C3/4 level impinging on the thecal sac, disc herniation at C5/6 impinging upon the thecal sac abutting the spinal cord, disc herniation at C6/7 impinging upon the thecal sac and right lateral recess. With respect to the lumbar spine, Dr. Kolb finds a disc herniation at the L4/5 level impinging on the thecal sac with impingement on the bilateral extra thecal L5 nerve roots as well as the exiting right L4 nerve root; and a disc herniation at the L5/S1 impinging upon the upon the anterior epidural fat. Dr. Kolb's review of the MRI of Plaintiff's left shoulder reveals a partial tear of the rotator cuff involving the supraspinatus and infraspinatus tendons with joint and bursal effusion, Os acromiale, and tear of the anterior superior labrum.

Plaintiff also submits the Affirmation of Dr. Kevin Wright, Plaintiff's treating physician who states that Mr. Lewis suffered a significant and permanent injury to his left shoulder as a result of the April 20, 2018 accident.

It is settled law that on a motion for summary judgment, the moving party has the initial burden of demonstrating, by admissible evidence, their right to judgment. The burden then shifts to the opposing party, who must proffer evidence in admissible form establishing that an issue of fact exists warranting a trial. CPLR §1129(b); *Zuckerman v. City of New York*, 49 N.Y.2d 557 (1980); *Singer v. Friedman*, 220 A.D.2d 574 (2<sup>nd</sup> Dept 1995). Mere conclusions, expressions of hope or unsubstantiated allegations are insufficient to raise a triable issue of fact. *Alvord & Swift v. Muller Constr. Co.*, 46 N.Y.2d 276 (1978) Further, issue finding rather than issue determination is the function of the court on motions for summary judgment. *Esteve v. Abad*, 271 A.D. 725 (1<sup>st</sup> Dept 1947); *Stillman v. Twentieth Century Fox F. Corp.*, 3 N.Y.2d 395 (1957); *Clearwater Realty Co. v. Hernandez*, 256 A.D.2d 100 (1<sup>st</sup> Dept 1998). Additionally, the role of the court is not to resolve issues of credibility. *Knepka v. Tallman*, 278 A.D.2d 811 (4<sup>th</sup> Dept 2000) Since summary judgment is a drastic remedy it should not be granted where there is any doubt as to the existence of a triable issue of fact. *Rotuba Extruders v. Ceppos*, 46 N.Y.2d 223 (1978). Thus, where the existence of an issue of fact is arguable summary judgment should not be granted. *Stone v. Goodson*, 8 N.Y.2d 8 (1960). Viewing the evidence in the light most favorable to the party opposing the motion for summary judgment, namely the Plaintiff, there exists triable issues

of material fact for determination by a jury. See: *Bacon v. County of Westchester*, 149 A.D.2d 451 (2<sup>nd</sup> Dept 1989); *Mutschnik v. Summit Brokerage Corp.*, 148 A.D.2d 427 (2<sup>nd</sup> Dept 1989).

The Defendants' motion and for an Order pursuant to CPLR § 3212 awarding Summary Judgment in favor of the Defendants dismissing Plaintiff's Complaint for failure to comply with the threshold requirement of Insurance Law § 5102(d) is **denied**.

Settle Order.

Dated: September 28, 2021

  
Hon. Ben R. Barbato, JSC